Abdul Johari bin Abdul Rahman v Lim How Chong & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–140 OF 1993
ABDUL HAMID EMBONG J
12 MAY 1999

Landlord and Tenant *— Duration — Equitable estoppel — Expenditure by tenant — Whether there had been encouragement by landlord that there would be a lease for as long as the tenant wishes*

Loke Wan Yat Realty Ltd ('LWY') had rented premises Nos 72, 74 and 76, Jalan CM Yussuf, Ipoh ('the premises') to Hollywood Hotel ('HH'), the seventh defendant, pursuant to a tenancy agreement entered into between LWY and HH on 21 July 1958. Prior to this agreement, two partners of HH had approached one Mr Lam Say Kee, the then manager of LWY, offering to buy the premises as they had wanted to build a hotel on that land. Mr Lam instead offered to build the hotel and rent it out to them. During the negotiations, there was a request for additional bathrooms to be constructed and a sum of RM25,000 was agreed to be paid as compensation to LWY. HH had also paid a fee of RM34,000 to two brokers for their role in securing the tenancy agreement. Later, HH had also allegedly spent huge sums of money — RM225,000 to decorate and furnish the hotel and RM191,000 to upgrade and refurbish the hotel.

In September 1992, the plaintiff purchased the premises from LWY together with nine other shoplots along Jalan CM Yussuf owned by LWY. In March 1993, the plaintiff informed the defendants that the rental for the premises would be increased to RM25,000 effective 1 April 1993. On 22 April, notice was issued to HH demanding rent at RM25,000 coupled with a notice to quit by 31 May 1993 if the new rent was not accepted. The defendants by a letter dated 13 July 1993 challenged the notice to quit. It was the defendants' contention that an equity had arisen in favour of HH, having regard to the conduct and relationship between HH and LWY. As such, HH was not occupying the premises under a mere monthly tenancy but under an assurance given by LWY that HH was entitled to occupy the premises for as long as they wished. They also contended that the plaintiff had since waived the notice to quit having accepted HH's RM15,000 deposit for rental from LWY.

Held:

(1) HH had not been encouraged to expend money in expectation of a tenancy for as long as they wished. The RM25,000 paid by HH was a result of negotiations held between the parties so that HH could get hold of the premises in a state they wanted, ie with extra bathrooms (see pp 610I–611A). The RM34,000 paid to the two brokers was nothing more than brokerage fee with no conditions attached or representations made (see p 614A), and the extra

expenditure of RM225,000 and RM191,000, was nothing more than the normal expenditure expected of any hotel business in maintaining and upgrading their services and the upkeep and refurbishing of a hotel operation (see p 613C).

(2) The plaintiff had done all that he reasonably could to determine that there was no special tenancy other than a monthly one attached to HH (see p 615H).

(3) The notice to quit was valid and effective. As a monthly tenant, HH was entitled to receive a month's notice which they did. There was no basis for that notice to be impugned (see p 616C–D).

(4) The issue on the waiver of the notice to quit deserves no consideration as it was not pleaded in the defence. The question was also not put forward during the cross-examination of the plaintiff. This issue was also not included in the amended and re-amended statements of defence (see pp 606H–607A).

Obiter:

(1) There was no evidence to support the defence contention of a waiver. The money received was merely a deposit and not rent. There was no evidence that it was intended that a revised tenancy on fresh terms was to be entered into between the parties. The conduct of the parties, in particular the plaintiff returning the deposit after purchasing the premises, indicates that HH was treated as a monthly tenant (see p 608C–E).

(2) The equity, assuming that it exists, has been fully satisfied. The long term tenancy, asked for by the defence, would be governed by the law existing when the tenancy agreement was entered into. The relevant provision, s 47 of the Land Code 1926, provides for the maximum period of such tenancies as 30 years. Section 47 survives the National Land Code 1965 ('NLC') and was saved thereunder by s 4(1). The maximum 30 years tenancy could not, with the coming into force of the NLC, be automatically extended to 99 years under s 221(3) of the NLC. There had also been sufficient satisfaction of the equity in view of HH's long occupation of the premises and the profits reaped in that duration (see pp 614E–615G).

[Bahasa Malaysia summary

Loke Wan Realty Ltd ('LWY') telah menyewa premis No 72, 74 dan 76, Jalan CM Yussuf, Ipoh ('premis tersebut') kepada Hollywood Hotel ('HH'), defendan ketujuh, menurut satu perjanjian penyewaan yang dimasuki di antara LWY dan HH pada 21 Julai 1958. Sebelum perjanjian ini, dua rakan kongsi HH telah bertemu dengan En Lam Say Kee, ketika itu adalah pengurus LWY, dan menawar untuk membeli premis tersebut kerana mereka ingin membina hotel di atas

A tanah tersebut. Sebaliknya, En Lam telah menawar untuk membina hotel tersebut dan menyewakan kepada mereka. Semasa rundingan, terdapat permintaan untuk pembinaan bilik mandi tambahan dan sejumalah RM25,000 telah dipersetujui dibayar sebagai pampasan kepada LWY. HH juga telah membayar bayaran sebanyak RM34,000 kepada dua broker kerana peranan mereka dalam mendapatkan B perjanjian penyewaan tersebut. Kemudian, HH juga telah dikatakan membelanjakan sejumlah wang yang banyak berjumlah RM225,000 untuk menghias dan melengkapkan hotel dan RM191,000 untuk meningkatkan dan membersihkan hotel.

Pada September 1992, plaintif telah membeli premise tersebut C daripada LWY bersama-sama dengan sembilan lot kedai yang lain di Jalan CM Yussuf yang dimiliki oleh LWY. Pada Mac 1993, plaintiff telah memberitahu defendan-defendan bahawa sewa untuk premis tersebut akan dinaikkan kepada RM25,000 mulai 1 April 1993. Pada 22 April 1993, notis telah dikeluarkan kepada HH untuk menuntut sewa sebanyak RM25,000 bersama-sama dengan notis keluar D menjelang 31 Mei 1993 jika sewa baru tidak diterima. Defendan-defendan telah melalui surat bertarikh 13 Julai 1993 mempertikaikan notis keluar tersebut. Adalah menjadi penegasan defendan-defendan bahawa ekuiti telah timbul yang berpihak kepada HH, dengan mengambil kira kelakuan dan hubungan antara HH dan LWY. Oleh itu, HH tidak menduduki premis tersebut di bawah satu penyewaan E bulanan sahaja tetapi di bawah jaminan yang diberikan oleh LWY bahawa HH adalah berhak utnuk menduduki premis tersebut selama yang mereka inginkan. Mereka juga menegaskan bahawa plaintif telah mengketepikan notis keluar tersebut selepas menerima deposit HH sebanyak RM15,000 sebagai sewa daripada LWY.

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Diputuskan:

(1) HH tidak digalakkan untuk membelanjakan wang atas harapan terdapat suatu penyewaan yang selama mereka inginkan. Jumlah RM25,000 tersebut telah dibayar oleh HH sebagai hasil rundingan yang diadakan di antara pihak-pihak agar HH boleh G mendapatkan premis tersebut dalam keadaan yang mereka ingini, iaitu dengan bilik mandi tambahan (lihat ms 610I–611A). Jumlah RM34,000 tersebut yang telah dibayar kepada dua broker tersebut tidak lebih daripada bayaran broker tanpa apa-apa syarat atau representasi (lihat ms 614A), dan perbelanjaan tambahan H sebanyak RM225,000 dan RM191,000 tidak lebih daripada perbelanjaan biasa yang dijangka oleh sebarang perniagaan hotel dalam mengekalkan dan meningkatkan perkhidmatan mereka, serta juga penjagaan dan pembersihan operasi hotel (lihat ms 613C).

(2) Plaintif telah melakukan apa yang munasabah yang beliau boleh I lakukan untuk memutuskan bahawa tidak terdapat apa-apa penyewaan khas selain daripada penyewaan bulanan berkenaan dengan HH (lihat ms 615H).

(3) Notis keluar tersebut adalah sah dan berkesan. Sebagai penyewa bulanan, HH berhak untuk menerima satu bulan notis yang mereka telah terima. Tiada terdapat dasar untuk mempersoalkan notis tersebut (lihat ms 616C–D).

(4) Isu pengketepian notis keluar tersebut tidak berhak untuk dipertimbangkan kerana ia tidak diplidkan di dalam pembelaan. Persoalan tersebut juga tidak dikemukakan semasa pemeriksaan balas plaintif. Isu ini juga tidak dimasukkan di dalam pernyataan pembelaan yang terpinda dan pernyataan pembelaan yang dipinda semula (lihat ms 606H–607A).

Obiter:

(1) Tidak terdapat keterangan untuk menyokong penegasan pembelaan mengenai suatu pengketepian. Wang yang diterima hanyalah deposit dan bukan sewa. Tidak terdapat keterangan yang menunjukkan bahawa adalah diniatkan bahawa suatu penyewaan yang boleh diubah di atas terma yang baru akan dimasuki di antara pihak-pihak. Kelakuan pihak-pihak, terutamanya plaintif dalam memulangkan deposit selepas membeli premis tersebut, menunjukkan bahawa HH dianggap sebagai penyewa bulanan (lihat ms 608C–E).

(2) Ekuiti tersebut, jika dianggap wujud, telah pun dipuaskan sepenuhnya. Penyewaan jangka panjang, yang telah diminta oleh pihak pembelaan, akan ditentukan oleh undang-undang sedia ada apabila perjanjian penyewaan dimasuki. Peruntukan yang relevan, s 47 Kanun Tanah 1926, memperuntukkan bagi tempoh maksimum untuk penyewaan adalah 30 tahun. Seksyen 47 masih terpakai walaupun dengan kewujudan Kanun Tanah Negara 1965 ('KTN') kerana ia telah diteruskan di bawah s 4(1). Tempoh masa maksimum selama 30 tahun tidak boleh, dengan berkuatkuasanya KTN, secara automatik dipanjangkan kepada 99 tahun di bawah s 221(3) KTN. Terdapat juga kepuasan ekuiti yang mencukupi dengan melihat kepada pendudukan HH yang lama di premis tersebut dan juga keuntungan yang diraih semasa tempoh tersebut (lihat ms 614E–615G).]

Notes

For cases on equitable estoppel, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 998–1006.

Cases referred to

Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid [1996] 4 MLJ 623 (refd)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327 (refd)
Charted Bank, The v Yong Chan [1974] 1 MLJ 157 (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (refd)
Haji Abdul Hamid v MK Ramasamy Pillai [1949] MLJ 15 (refd)
Imbi World Sdn Bhd v Deluxe Tours Sdn Bhd [1997] 3 MLJ 531 (refd)
Inwards & Ors v Baker [1965] 1 All ER 446 (refd)
Lee Lean Low v Chew In Hai & Ors [1993] 2 AMR 3244 (refd)
Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7 (refd)
Mok Deng Chee v Yap See Hoi [1981] 2 MLJ 321 (refd)
Oversea-Chinese Bank Corp Ltd v Eastern Auto Co Ltd [1961] MLJ 300 (refd)
Ramsden v Dyson (1866) LR 1 HL 129 (refd)
Saadian bte Karim v Ong Ting Chai [1996] 5 MLJ 646 (refd)
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)
UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)
Yong Tong Hong v Siew Soon Wah & Ors [1971] 2 MLJ 105 (refd)

Legislation referred to

National Land Code 1965 s 4 (1), 221
Land Code 1926 s 47
Civil Law Act 1956 s 24(8)(a)

Gurbachan Singh (*Bachan & Kartar*) for the plaintiff.

A Iruthaya Raj (*Raj Selva & Co*) for the first, third, fourth and sixth defendants.

Chee Weng Weng (*Chee Weng Weng & Co*) for the fifth and seventh defendants.

Abdul Hamid Embong J:

Background facts

The first to the sixth defendants are the existing partners to Hollywood Hotel ('HH') ie, the seventh defendant, which was registered as a partnership on 20 October 1959. HH rented premises Nos 72, 74 and 76, Jalan CM Yussuf, Ipoh, the premises now under dispute ('the said premises'), pursuant to a written tenancy agreement dated 21 July 1958 ('exh D1'), entered into between the then landlord, Loke Wan Yat Realty Ltd (LWY) and Yong Kin Chin (deceased) as a trustee of HH. LWY then owned a row of 12 lots along the said Jalan CM Yussuff (then Jalan Chamberlain) and had constructed a hotel on the said premises. HH has been, since 21 July 1958 and is still occupying the said premises and has been operating a hotel thereon since Christmas Day in 1959. LWY also constructed double-storey shophouses on the other nine lots and let them out to various other tenants, including one to the plaintiff's father, ie the lot

adjacent to HH, who operated a restaurant called Rahman Restaurant on it. The plaintiff bought the said premises from LWY on 22 September 1992, together with the other nine shophouses, ie Nos 72 to 94 Jalan CM Yusuff, for RM4,375,000, 'without vacant possession and subject to the rights of all occupants presently on the said property'. The sale and purchase agreement dated 22 September 1992 was tendered and marked as exh P1.

By a letter dated 24 March 1993 ('exh P7'), the plaintiff informed the defendants that the rental for the said premises would be increased from RM5100 monthly to RM25,000 effective 1 April 1993. On 22 April 1993, the plaintiff caused a notice to be issued to HH through his solicitor ('exh P8') demanding rent at RM25,000 a month coupled with a notice to quit by 31 May 1993 if the new rent was not accepted. The said notice also stated that HH's tenancy was on a month to month basis with one month's notice for termination. The defendants by a letter dated 13 July 1993 challenged the notice to quit.

The plaintiff now seeks for the following orders:

(a) vacant possession of the said premises now occupied by HH within 30 days of an order made by the court;

(b) damages in the sum of RM25,000 per month calculated from 1 April 1993 or 1 June 1993;

(c) interest;

(d) costs; and

(e) further or other reliefs.

Defence and counterclaim

HH and its partners are resisting this suit on the following grounds:

(a) having regard to the conduct and relationship between HH and LWY, there had arisen an equity in favour of HH;

(b) the equity arose as a result of a payment of RM25,000 in 1958 towards the construction costs paid by HH to LWY;

(c) HH is not occupying the premises under a mere monthly tenancy but under an assurance given by LWY whereby the partnership is entitled to occupy the premises for as long as they wished;

(d) being a purchaser with notice of the equity the plaintiff is bound by it.

(e) the notice to quit given by the plaintiff was invalid;

(f) by way of a counterclaim, the defendants seek for a declaration that HH is a tenant coupled with an equity for 99 years, and for damages and costs.

Plaintiff's case

In his evidence, the plaintiff ('PW1') stated that he had enquired into the type of tenancy held in the 12 shophouses before purchasing them. At that time the 12 shophouses were managed for LWY by an agent, Excelsior

A Services (Ipoh) Sdn Bhd ('Excelsior'), who acted as rent collector for LWY. The plaintiff, as one of the tenants of LWY, had also paid rental to Excelsior. One Miss Leow Yang Leng ('PW2'), a director and paid employee of Excelsior managed the rental collections for all of LWY's properties in Ipoh. In the plaintiff's discussion with PW2 prior to the purchase of the said premises, the plaintiff was never informed by PW2 that
B HH had a tenancy in the said premises for 'as long as they wished'. The plaintiff had also through his solicitors on 13 August 1992 ('exh P5') written to LWY's then solicitors, M/s Shearn Delamore, to enquire if there were any tenancy agreements signed with the other occupants (besides the plaintiff himself) of the other shophouses and received confirmation from
C LWY's solicitors that no tenancy agreements were in existence with them (see exh P6, dated 21 August 1992). The plaintiff said that he would not have purchased the said premises if he knew that the defendants had a tenancy for as long as they wished. The plaintiff also stated that he had been informed by Excelsior that the tenancy of HH could be terminated with one month's notice. Receipts on the rentals paid by HH (exhs 'P12' and 'P13')
D were also produced to show the terms and conditions of the tenancy as printed on their reverse, stating that the tenancy ran on a month to month basis. The plaintiff referred to an agreement dated 21 July 1958 ('exh D1') entered into between LWY and HH and said that he had seen exh D1 before he purchased the said premises. He also stated that according to cll 3
E and 5 of exh DI, the tenancy of HH was on a monthly basis.

After purchasing the said premises, the plaintiff had negotiations with the fifth defendant ('DW5') who was then managing the operations of HH regarding the new rent of RM25,000 which the plaintiff had asked for. Various negotiations took place including negotiations with the plaintiff's
F agent, one Mr SK Khoo. On 29 June 1993 the defendants wrote to the plaintiff (exh P10) agreeing to take a tenancy on the said premises for a minimum period of two years at a monthly rental of RM13,000 inclusive of the car park area situated behind HH with a condition that the plaintiff, on the termination of the tenancy, purchased all the furniture and fittings, air conditioners, television and other movable items in HH at the prevailing
G market value. The plaintiff rejected that condition. The plaintiff stated that during his negotiations with DW5, the latter had not mentioned that HH possessed a tenancy for as long as they wished on the said premises.

PW2, Miss Leow of Excelsior, in her evidence confirmed that there was no tenancy agreement signed with HH. She said that the tenancy was on a
H month to month basis and that her principal, LWY had not intended to allow HH to stay on the said premises for as long as they wished. PW2 also stated that she had never represented to HH that they may stay for as long as they wished. She also confirmed that she informed the plaintiff that HH was a monthly tenant of LWY, similar to the other tenants of LWY along the same road. PW2 also denied that HH had informed the landlord, LWY,
I that HH wished to spend RM250,000 on renovations and refurnishing. She had met one of HH's partners, ie DW5, and no mention of renovations was made by DW5 during that meeting. PW2 also denied that LWY had in October 1992 offered a three-year tenancy to HH.

Under cross-examination by Mr Chee, learned counsel for the fifth and seventh defendants, PW2 agreed that the terms and conditions of the tenancy as printed on the reverse of the rental receipts were all uniformed and the same receipts were issued to all of the 150 properties in Ipoh belonging to LWY. She also admitted that she was not aware of any previous arrangement between HH and LWY before Excelsior commenced the management of LWY's properties on 1 January 1986. A B

PW3 was Mr Daniel Tay, who acted as solicitor to the plaintiff in preparing the sale and purchase agreement (exh P1) to purchase the said premises. He testified that he conducted a search on the land and could not find the nature of tenancy of HH stated anywhere. He also said that from his correspondence with M/s Shearn and Delamore, solicitors for LWY, it was confirmed that no agreement was entered into between LWY and HH, in respect of the latter's tenancy. He also said that he had discussed the nature of tenancy of HH with the plaintiff and had advised the plaintiff that, from the printed receipts, and in the absence of any written agreement, he was of the view that the tenancy was on a monthly basis and may be terminated with one month's notice. He further stated that there was no indication of a tenancy for a period of as long as HH wished to occupy the said premises. To a question by Mr Chee under cross-examination, PW3 agreed that he had not gone into the history of the previous owner, ie LWY, and that his opinion was based only on the facts known to him, without considering the history of the said premises. He also said that he had not seen exh D1, ie the 1958 tenancy agreement between LWY and HH. However upon perusing exh D1, he said that there was no basis for him to change his opinion on the nature of HH's tenancy. C D E

PW5 was Madam Ruby Loke a director since 1960 of LWY, a family company. She was responsible for policy matters of LWY. She too stated that HH's tenancy was on a month to month basis and this was confirmed by cl 3 of exh D1. She stated that any variation of the tenure of HH would be with her knowledge. She also explained that the sum of RM25,000 mentioned in cl 1 of exh D1 was paid by HH to LWY as compensation for putting up extra bathrooms in the said premises. It was not a form of contribution or premium. PW5 also testified that she took part in the drafting of the terms and conditions of the tenancy as printed on the reverse side of the receipts (exhs P4, P12 and P13) and stated that the tenancy for all the 12 shophouses along Jalan CM Yusuff was a common monthly tenancy although LWY was then under the erroneous impression that they were rent-controlled premises. F G

PW5 further stated that LWY had never represented to or allowed HH to remain on the premises for as long as they wished. PW5 was then adverted to para 8(b) and (f) of the amended statement of defence and counterclaim of PW5 which states: H

> 8 (b) The Trustee of Hollywood Hotel has in turn paid to the Previous Owner a sum of RM25,000 as contribution towards part construction cost of the said Premises pursuant to an agreement dated 21 July 1958 made between the Previous Owner of the one part and Yong Kim Chin as Trustee of Hollywood Hotel of the other part (hereinafter called the First Agreement). I

In order to secure the execution of the First Agreement the Trustee of Hollywood Hotel had to pay an additional sum of RM34,000 as service charges to two persons called Poh Cheng Ooi and Khor Heng Siew (hereinafter called the Brokers) pursuant to an agreement dated 21 July 1958 made between the Trustee of Hollywood Hotel of the one part AND the Brokers of the other part (hereinafter called the Second Agreement);

(f) Sometime in September and/or October 1992 the Previous Owner through its authorised officer and or agent represented to and informed this Defendant, the Trustee, that the previous Owner would continue to grant the Trustee of Hollywood Hotel a tenancy of the said Premises to operate a hotel business for as long as the Trustee of Hollywood hotel desires and would allow Hollywood Hotel to do renovations and refurnishing to the said Premises on condition that Hollywood Hotel would pay to the Previous Owner a deposit sum equivalent to 3 months' rental of RM15,000 AND PROVIDED that Hollywood Hotel would also pay to the Previous Owner a monthly rental of RM5,000 for the said Premises and RM100 per month for the vacant lot behind the said Premises.

She then stated that the allegations made in those paragraphs were definitely not true and that that was the first time she had heard of them. She also stated that she would have known of such representation and that the same would never have happened without her knowledge. She further stated that the tenancy of HH was not coupled with any interest or equity of any kind.

When shown exh D1, under cross-examination by Mr Raj Selva, learned counsel for the first, third, fourth and sixth defendants, PW5 said that she had not seen that agreement. She however said that exh D1 had not intended that HH be allowed to remain on the said premises forever, but instead had stated that the tenancy was on a month to month basis. She confirmed that exh D1 was signed by her late granduncle, Lam Say Kee, then in charge of LWY office in Ipoh.

In May 1990, LWY had offered all its tenants in the 12 shophouses along Jalan CM Yussuff to purchase the properties, provided that the purchaser buys all the 12 shophouses en bloc. When the sale was completed with the plaintiff, LWY had notified all its previous tenants (Nos 72–94 Jalan CM Yusuff) to pay their rents directly to the plaintiff as the new owner (exhs P14A-F). In P 14, the nature of the tenancy being on a month to month basis with one month's notice to quit was also notified to all the existing tenants.

PW7 was Puan Santha Menon, a solicitor practising in the law firm of Shearn and Delamore who was then acting for LWY in respect of the sale and purchase of the 12 shophouses at Jalan CM Yusuff. She had attested to exh P1, the sale and purchase agreement. She explained that the phrase 'subject to the rights of all occupants' inserted in cl 1 of exh P1 was put in to protect the statutory tenants because she had been mistakenly informed that the shophouses were rent-controlled premises. It was also to ensure that the purchaser would take over the obligations of LWY to the tenants. She confirmed that there was no subsisting agreements between LWY and

its then tenants occupying the 12 shophouses. She also stated that even her client, LWY, was then under the mistaken impression that the said premises were subject to rent control.

PW8 was Mr Cheah Choi Kow a businessman who testifed that in 1993 he had offered the plaintiff to rent the hotel (the said premises) at RM25,000 per month. He testified that the hotel business was viable and that it would be in synergy with his travel business. However he was not aware that the plaintiff had, in June 1993, offered HH to continue with the tenancy at a monthly rental of RM15,000.

The defence case

Put shortly, the defence case was that HH had a tenancy coupled with an equity on the said premises and that this was binding on the plaintiff as a successor in title to the original owner, LWY, who signed the tenancy agreement with HH on 21 July 1958. This defence is reflected in the re-amended counterclaim of the fifth defendant by way of the following prayer:

> (A) a declaration that the Trustee of Hollywood Hotel is entitled to a tenancy coupled with an equity for a lease of 99 years or for such period as may be deemed reasonable by this Honourable Court.

DW3, Mr Lim How Chong, one of the surviving original partners of HH gave evidence stating that in 1958, he together with DW4, ie Mr Choy Soo Eng (the fourth defendant) and another partner had a meeting with one Mr Lam Say Kee, the then manager of LWY offering to buy the three lots on which HH now stands, as they had wanted to build a hotel on that land. Mr Lam had told them that LWY would build the hotel and rent it out to them. After prolonged negotiations, rental of RM2,100 per month for the hotel premises was agreed and rental of RM50 per month was agreed for the vacant land behind the hotel to be used as a parking lot. LWY was also requested to construct additional bathrooms to be attached to the bedrooms and a sum of RM25,000 was agreed to be paid as compensation to LWY. The negotiations took six to seven months after which the tenancy agreement, exh D1 was drawn up and signed by both parties who were respectively represented by their own solicitors. On the same day that exh D1 was executed a brokerage agreement (exh D2) was also signed between HH and the two brokers, ie Mr Khoo Eng Siew and Mr Poh Cheng Ooi, in which a brokerage fee of RM34,000 was paid by HH to the two brokers for their role in securing the HH tenancy. That brokerage agreement was prepared by HH's lawyer pursuant to instructions given by HH's partners.

The evidence on what transpired during the negotiations held between the partners of HH and Mr Lam of LWY was objected to by learned counsel for the plaintiff on the grounds of hearsay and that it offended ss 91 and 92 of the Evidence Act. I had ruled, after hearing arguments, that it was not hearsay as DW3 was present during the negotiations and that his evidence was merely to show his perception of what happened during the negotiations, to determine his state of mind, not to the truth of what Mr

Lam had allegedly told them (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352. As for offending the provisions of ss 91 and 92 of the Evidence Act, I ruled that DW3's testimony should proceed first, and a ruling be made at the end of the case.

DW3 also testified that he was present together with DW4 and Mr Yong Kin Chin (HH's managing partner then) when the terms of exh D1 were discussed with HH's solicitor. Under cross-examination DW3 also stated that when Yong Kin Chin signed the tenancy agreement (exh D1) on behalf of HH, he was satisfied with the terms and conditions stated in exh D1 and had never challenged it. DW3 also said that he heard Yong Kin Chin telling their solicitor that HH was to have a tenancy for as long as they wished, and that the solicitor had confirmed this. When cross-examined why exh Dl had stated that the term was for a monthly tenancy and why the term 'for as long as HH wished' did not appear in the agreement, DW3 refused to answer and on being pressed he said he did not know. He however said that HH's solicitor approved the agreement after instructions were given to him and that they trusted the solicitor to follow the terms and conditions as was verbally instructed to him. On the payment of the RM25,000 to LWY as stated in exh D1, DW3 agreed that it was paid as compensation to put up extra bathrooms.

DW4 in his testimony stated that he and DW3 were the only surviving partners of HH, from the original six, and that he was taken by Khoo Hong Siew to negotiate the construction of a hotel with Lam Say Kee, then LWY's manager. He confirmed that HH would rent the said premises after the hotel was built and that the rental was at RM2,100 per month for the hotel and a further RM50 per month for the parking lot. He said that there was no mention of the terms of the tenancy during the negotiations. He also said that a brokerage fee of RM34,000 was paid to the two brokers. The tenancy agreement (exh D1) was later signed by the late Mr Yong Kin Chin on HH's behalf in his presence and HH commenced their business on 25 December 1959. DW4 also stated that HH was built according to the partners' requirements, after prolonged negotiations. The partnership total capital was RM225,000 and his personal contribution was RM30,000. He further said that his personal profit from the hotel business over 30 years was about RM10,000 a year.

Under cross-examination, DW4 admitted that exh D1 did not state that the tenancy was for as long as HH wished. He also said that the brokers did not undertake to secure a tenancy for as long as HH wished. He also agreed that the RM25,000 paid to the landlord was as compensation for building extra bathrooms in HH but said that the partners were willing to pay that sum because the landlord had agreed to rent out the said premises to HH for a long time.

DW5, Mr Yong Yok Hooi, is the current managing partner of HH. He took over the management of HH from his late father, Yong Kin Chin, an original partner of HH. He denied that there was a negotiation with the plaintiff in March 1993 to rent the said premises from the plaintiff for RM20,000. He stated that today HH has 43 rooms, of which 37 are let out

to guests and the others used as offices and store rooms. When he took over the hotel's management in 1986 the rental was RM5000 per month and RM100 for the car park. When referred to exh P10 (ie letter dated 27 June 1993, written by HH to the plaintiff to take a two year tenancy on the said premises for RM13,000 monthly rental), DW5 explained that when he wrote exh P10, he was not aware of the history of HH's tenancy with LWY. He however said that he had the tenancy agreement (exh D1) and the brokerage agreement (exh D2) in his possession when he took over HH's management. DW5 said it was only in the partners' meeting after the plaintiff had filed this suit that the history of HH's tenancy was discussed when DW3 and DW4, the original partners, explained that the previous owner (LWY) had asked for RM25,000 and that that sum was paid on the understanding that HH could have a tenancy for as long as they wished. DW5 said that that was the first time he heard of the history of HH's tenancy. Pausing momentarily, I find myself unable to accept DW5's explanation worthy of belief. DW5 had been the sole managing partner of HH since he took over from his father in 1986. DW3 and DW4 were around in Ipoh all these while and had been participating in the profits of HH's business. It would be unbelievable for DW5 not to have known the background of HH operations and especially the history to that payment of RM25,000 to LWY. The said payment was clearly mentioned in exh D1 and DW5 had testified that he had sight of exh D1 when he took over HH's management. The reasonable inference would be that DW5 must have known about this payment and that DW3 and DW4 must have told DW5 of HH's background antecedents when the latter took over its management in 1986. Next, this court must view this evidence with critical suspicion as it was stated that DW5 was only informed of this matter when a dispute arose between HH and the plaintiff in respect of the tenancy. This explanation, it may be added, is also inconsistent with DW5's earlier testimony that he had heard about this payment of RM25,000 to LWY from his father, when DW5 was 17 years old. He had also stated in re-examination, that he had seen the tenancy agreement in 1986 and had himself passed it over to DW4. Surely, as a person responsible for running HH's business, the status of the hotel's tenancy was of utmost significance and would have been known, or inquired into by DW5 when he took over the management in 1986. That part of DW5's evidence, must therefore be rejected by the court as being too incredible to be believed. As regards the history behind the payment of that RM25,000, I also find that DW5's explanation to be sheer supposition which in fact is self-refuted by contemporary document ie exh Dl. It is perhaps apt to borrow the words of Samuel Jackson to express this court's finding on DW5's evidence:

> All history, so far as it is not supported by contemporary evidence, is romance.

Under cross-examination, DW5 agreed to the contents of exh P10 and said that he was willing to take a tenancy of two years at a monthly rental of RM13,000. He also agreed that he had had notice to quit HH (exh P8) but did not comply with it.

Issues for determination

The defence contended that they had a tenancy for as long as they wished on the said premises. They now claim for a tenancy of 99 years from the date of signing of the tenancy agreement, 21 July 1958, pursuant to s 221(3)(a) of the National Land Code ('NLC'). Section 221(1)–(3) now reproduced for easy reference:

> Power of proprietors to lease for terms exceeding 3 years
>
> (1) Subject to the provisions of sections 225 and 226, the proprietor of any alienated land may grant leases of the whole or any part thereof in accordance with the following provisions of this section.
>
> (2) Every lease granted pursuant to this section shall be for a term exceeding three years.
>
> (3) The maximum term for which any lease may be so granted shall be —
>
> (a) ninety-nine years if it relates to the whole of any alienated land, and
>
> (b) thirty years if it relates to a part only thereof.

The defence also contended that the notice to quit (exh P8) dated 22 April 1993 asking the defendants to vacate the said premises by 31 May 1993 was ineffective to terminate the tenancy.

Learned counsels for the defence in submission relied heavily on the fact that the partners of HH had paid RM25,000 to the previous owner way back in 1958 in order to obtain the said premises according to their requirement, and also paid a further RM34,000 as brokerage fee to secure the tenancy. It was submitted that no reasonable businessman would spend a huge sum of RM59,000, 40 years ago to merely acquire a monthly tenancy. This court was asked to scrutinize exh D1, the tenancy agreement, and conclude it as not being a simple tenancy agreement in view of the obligation by the defendants to pay RM25,000 towards the construction costs. The defence also contended that the conditions of tenancy which inter alia stated that the tenancy was on a monthly basis, printed on the reverse of the rent receipts issued to all of LWY's tenants did not in itself constitute a contract or have an estoppel effect and cited *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors*, a leading authority on the law relating to tenancy coupled with an equity. Mr Raj Selva also submitted that LWY must have represented or created an expectation in the minds of the then partners that HH was not getting a mere monthly tenancy but a long term tenancy. From the conduct of the parties he concluded that there was no uncertainty in the minds of the parties then, and cited a passage from the Federal Court judgment in *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105, where Ong CJ stated (at pp107–108):

> In the instant case, it may truly be said that there was, in the minds of the contracting parties, no uncertainty as to the period of tenure. No tenant would willingly pay a large sum of money for a simple monthly tenancy which is terminable at the will of the landlord at any time, or even after the month next following. Hence the parties here had expressly agreed upon a 'permanent' letting. On the faith thereof, the RM8,000 was paid and the structural alterations made, doubtless at the appellant's expense, as consideration for his

> remaining in undisturbed occupation for as long as he pleases, provided rent is paid at the rate stated.

Mr Chee, additionally submitted that the notice to quit (exh P8) was invalid and ineffective. He contended that although rent was paid on a monthly basis, it does not necessarily follow that the tenancy could be determined by a month's notice. In other words, the mode of payment of the rent was not a decisive factor and that this court is obliged to consider other material factors like the conduct and intention of parties and other relevant circumstances. Mr Chee also relied on *Cheng Hang Guan*'s case in urging this court to dissect the true intention of the parties. He further submitted that the rent receipts are devoid of any legal effect and the conditions thereon are not applicable to the special circumstances of the tenancy of HH and quoted a passage of Salleh Abas FJ's judgment in *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321, who said (at p 323):

> ... However, the matter did not end there, because the notice, clear and unambiguous in its terms, may not operate to terminate appellant's tenancy, if the appellant could prove to the satisfaction of the court that he had a tenancy coupled with an equity, or sometimes referred to, equitable estoppel.

Mr Chee further submitted that the notice to quit dated 22 April 1993 was also nullified by the plaintiff's acceptance of rental deposit for RM15,000 paid by HH to LWY some time in June 1993. The plaintiff had requested LWY to forward that RM15,000 deposit to him (plaintiff) and this, it was submitted, was diametrically contrary to the purpose of the said notice to quit.

Mr Raj Selva in addition contended that acceptance of the RM15,000 rent deposit by the plaintiff had the effect of and constituted a waiver to the notice to quit and an estoppel on the plaintiff from denying that the defendants held the tenancy on the same terms as they held from LWY. The plaintiff, he said, could not be allowed to approbate and reprobate and cited *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 and *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 in support of his estoppel contention. Mr Raj thus contended that one month's notice to quit was insufficient under the circumstances.

Findings of the court

Firstly, on the waiver of the notice to quit (exh P8), I find that this issue was not pleaded in the defence and as such the submission on this point deserves no consideration. During cross-examination of the plaintiff both learned counsels for the defendants also had not put this question of waiver to the plaintiff. It is an understatement to state that pleadings are all-important. It is also trite law that one is bound by their pleadings and that facts which are not pleaded should not be allowed to be adduced (see *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 and *Abdul Rahman Bin Abdul Karim v Abdul Wahab bin Abdul Hamid* [1996] 4 MLJ 623). The amended and re-amended statements of defence also did not include the issue of this rental

deposit as constituting a waiver although the defence had adverted to the fact that the plaintiff had received that rental deposit from the previous owner. Although the plaintiff had not objected to this issue when Mr Raj brought it up during cross-examination of the plaintiff, I still hold that the defendants cannot with liberty and at this late stage of submission, bring up the issue as a matter supporting the defence. When the issue was raised during cross-examination, (see NE pp 18 and 19) it was only to show that the plaintiff had given his consent to LWY, who had received the rental deposit earlier, to refund the said deposit to HH. This, LWY did, vide their letter dated 26 April 1993 (see exh D12). There was absolutely no evidence to show that when the plaintiff first received the rental deposit from LWY, after completion of the sale of HH, he did so with the understanding that HH would be granted a tenancy for as long as they wished. The rental deposit was a requirement imposed by LWY vide their letter to HH dated 13 July 1992 (see exh P17). When the sale and purchase agreement for the said premises was concluded on 22 September 1992, the condition of the sale was for the plaintiff to take over the said premises without vacant possession and subject to all the rights of the existing tenants.

As such, it was quite proper for the plaintiff to receive from LWY all rental deposits paid by all the tenants of LWY then (including HH). In P17 itself it was stated that the deposit would be refunded to HH upon termination of the tenancy. And the RM15,000 deposit was duly refunded when the plaintiff purchased the said premises. According to PW2, ie the author of P17, she wrote that letter to HH after informing one of HH's partners, ie DW5, personally that LWY had intended to enter into tenancy agreements with all of the existing tenants, including HH. The RM15,000 deposit was partly for rental and partly for water and electricity deposits. PW2 also stated that LWY had merely wanted to continue with the existing tenancies on a monthly term basis and no new agreements were intended.

PW2, under cross examination, also stated that it would only be logical to pass over the rental deposits to the plaintiff when the plaintiff purchased the said premises. It was therefore clear that the said deposit was not actual rental payment. The defendants could not furnish any authorities to support their contention that the acceptance of such deposit would operate as a waiver against the plaintiff. Learned counsel for the plaintiff referred to two authorities which I accept as stating the correct proposition in law in relation to an acceptance of rental which may amount to a waiver. The first case is *Haji Abdul Hamid v MK Ramasamy Pillai* [1949] MLJ 15 where Evans J stated (at p 17):

> ... As I understand the law, acceptance of rent is merely some evidence from which agreement may be inferred where alleged, and where it stands alone may be strong evidence. It is however, evidence and no more. It must be assessed in the light of all the circumstances and relations of the parties. In this case, to infer such agreement in all the circumstances would be manifestly unreasonable.

The second case is *Oversea-Chinese Banking Corp Ltd v Eastern Auto Co Ltd* [1961] MLJ 300, a Singapore authority, where it was held that:

(1) (a) waiver as operative in cases of tenancies is confined to cases of acceptance of rent after knowledge of a breach of covenant or an obligation of the tenancy and in such instances it is held to be a waiver of the breach or obligation. The breach here was not of a tenancy agreement but of a statutory provision. In such cases, the acceptance of rent with knowledge of the statutory breach could amount to an affirmation of the contractual tenancy but it could not amount to a waiver of the right to invoke jurisdiction of the court for an order for possession under the statutory provision;

I am in agreement with the views expressed in both the above cited cases. For a waiver to operate, the act of the landlord in accepting the rental after knowledge of the breach or obligation on the part of the tenant, must amount to a representation to the tenant that the landlord was willing to overlook the breach and that the tenant continued paying the rent in good faith and respecting the landlord's representation. This situation could not be said to exist in this case. Firstly, the said rental deposit was not rent received but merely a deposit for, inter alia, the usual utilities usage ie water and electricity and repair charges normally deducted on termination of the tenancy. Secondly, there was no evidence that there was intended that a revised tenancy on fresh terms was to be entered into between LWY and HH. And thirdly, the conduct of the parties, in particular the plaintiff in returning the deposit after purchasing the said premises speaks volumes for the situation that HH was treated for what it merely was, ie a monthly tenant. There was also not an iota of evidence to show that HH had been misled by the plaintiff to remain on the premises as tenants for as long as they wished. It was at the most, wishful thinking on HH's part and a mere conjecture unsupported by any evidence. It is trite law that the party asserting a fact must prove it. This proposition has now become a statutory burden of proof under s101 Evidence Act 1950 (see also *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4. On a balance of probabilities, I find that the defendants had failed to discharge this burden, and as such, the waiver and estoppel contention by the defence is rejected.

Whether HH's tenancy in the said premises was coupled with an equity

(i) Whether an equity existed in the tenancy

Mr Chee in his submission on this issue correctly stated the law on a tenancy coupled with an equity by relying on a passage in *Inwards & Ors v Baker* [1965] 1 All ER 446 at p 448 which states:

> It is quite plain from [the authorities] that, if the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity ... that the equity arising from the expectation of land does not fail ... even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money.

A It is now settled that this equitable principle is now applicable under our National Land Code (see *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202).

The defence also relied heavily on *Yong Tong Hong*, a Federal Court decision, confirmed on appeal to the Privy Council. The tenant in that case B was a sundry shop proprietor who occupied the whole ground floor of premises in a building belonging to the landlord. In 1958 when the building was nearing completion, the then owner of the building had asked the tenant to pay RM8,000 to the building contractor. The tenant was then let into occupation at a rental of RM150 per month. In October 1966 the landlord gave the tenant a notice to quit terminating the tenancy, unless the C tenant accepted a new tenancy at RM300 per month. The tenant rejected the offer on the ground that the landlord had earlier agreed in writing that the rent be at RM200 per month and would not be increased further unless there was an increase in the assessment rate. The landlord denied having made such an agreement even though he was supplied a photocopy of the said written agreement, and even denied receiving the RM8000 earlier paid D by the tenant. The photocopy of the said agreement was admitted as evidence at trial and the rough translated version recited the consideration of RM8000 as being received for a tenancy to endure 'as long as the tenant wishes to occupy', and the trial judge held that term to be void for uncertainty and in breach of s 30 of the Contracts (Malay States) Ordinance 1950. At the Federal Court, the agreement was sent for a certified E translation by the official interpreter. The certified version showed, inter alia, that the tenant having paid a deposit of RM8000 was allowed to occupy the ground floor on a permanent tenancy basis, at monthly rental of RM200. The Federal Court held that there was a permanent tenancy created and that the parties had expressly intended it to be so. This view of F the Federal Court is seen in the words of Ong CJ at p 107 now quoted:

> In the instant case it may truly be said that there was, in the minds of the contracting parties, no uncertainty as to the period of tenure. No tenant would willingly pay a large sum of money for a simple monthly tenancy which is terminable at the will of the landlord at any time, or even after the month next following. Hence the parties here had expressly agreed upon a 'permanent' G letting.

But His Lordship also held at p 107 that:

> Every case must, of course, be decided according to its peculiar facts. The distinction must be drawn between cases where the tenant can resist his landlord's claim on equitable grounds and others where he has no such H grounds.

In *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321, Salleh Abas FJ (as he then was) expounded the principle found in *Inwards v Baker* in this manner at p 323:

I > The principle is also known as equitable estoppel, because the landowner whose conduct has raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation.

For the principle to apply, it is therefore incumbent upon the defendants to prove, firstly, that the conduct of the landowner (LWY here) had given them an expectation to stay on the said premises for as long as they wished, and secondly, such conduct had induced the defendants to spend money on the said premises.

Inwards v Baker was a case where a son had built a bungalow on his father's land and had lived in it thereafter in the expectation and belief that he would be allowed to remain there for his lifetime or for so long as he wished. The trustees of his father's will brought proceedings for the possession of the bungalow.

Danckwerts LJ in his judgment said (at pp 449–450):

> ... this is one of those cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated.

According to defence counsels, the facts in this case showed that the defendants had also expended RM25,000 on the land under an expectation created or encouraged by the landlord that they would be able to remain there for as long as they wished. Further, it was submitted, the defendants had also paid a brokerage fee of RM34,000 to secure the tenancy. My task therefore is to analyse the facts to determine the intention of the parties when that RM25,000 was paid by the defendants to LWY. The defendants had initially approached LWY to purchase the land on which HH now stands. LWY refused to sell but said that they would build the said premises. After negotiations LWY agreed to add more bathrooms to meet the requirements of the defendants so that the said premises may be operated as a hotel. This was adhered to by LWY and the defendants agreed to pay a compensation of RM25,000 for constructing the extra bathrooms. That sum paid as compensation to LWY was reflected in the tenancy agreement (see cl 1 of exh D1).

In *Cheng Hang Guan*, Edgar Joseph Jr SCJ sitting in the High Court had, at p 405, referred to *Ramsden v Dyson* (1866) LR 1 HL 129 where Lord Kingsdown said:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promises or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, the court of equity will compel the landlord to give effect to such promise or expectation.

Such encouragement has been held to be either active or passive (see *Saadian bte Karim v Ong Ting Chai* [1996] 5 MLJ 646).

Now, even on the lower test of passive encouragement, I am of the view that this was not a situation where the defendants had been encouraged to expend money in expectation of a long tenancy. The RM25,000 was spent so that the defendants could derive an immediate benefit, ie the extra

A bathrooms attached to the bedrooms, so that the defendants could operate a hotel according to their specified requirement. To encourage is to do something which would give courage or confidence to the other party. Looking at the circumstance, I can find no evidence to reach a conclusion that LWY had encouraged the defendants into a belief or expectation that they (defendants) would acquire a tenancy for as long as they wished. The B money paid by the defendants, on the other hand was as a result of negotiations held by both parties so that the defendants could get hold of the said premises in a state that they wanted, ie with extra bathrooms. The negotiations resulted in the execution of exh D1. I find in exh D1, a document containing terms which cannot be impugned. It was an C agreement entered into between two level-headed parties and businessmen. They had also respectively consulted their lawyers and were properly advised.

Reviewing the evidence, I find that the defendants did not even inform their lawyer when D1 was drafted, that the RM25,000 was paid with an understanding that HH would take a tenancy for as long as they wished. D Surely such a crucial and important term would have been included into D1, if indeed the parties had so intended — as was the situation in *Yong Tong Hong*.

Exhibit D1 per se, does not disclose any bad bargain. The parties had clearly expressed therein an intention to create a monthly tenancy on the E said premises. The defendants had also expressed a willingness to pay a compensation of RM25,000 for the extra bathrooms. LWY did not require that sum to be paid as a contribution towards the construction cost. It was a compensation willingly paid by the defendants to get the extra bathrooms. As stated by PW5, Ruby Loke, LWY then 'had money through our ears'. No mention was made in exh D1 on a tenancy for as long as the defendants F wished. I can find no reason for this court to import into that tenancy agreement a non existent term now alleged by the defendants. The circumstances leading to the execution of exh D1 also did not show that the RM25,000 expended by the defendants was a result of any expectation created or encouragement given by LWY. To say so would be mere speculation and belie the contents of exh D1 and the evidence.

G In *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, Gopal Sri Ram JCA for the Federal Court said of upholding bargains at p 335:

> The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas Ltd v Co Arcos Ltd* [1932[All ER Rep 494, where he said:
>
> H
>
> 'Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the court should seek to I apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have

used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.' A

In *Yong Tong Hong*, Ong CJ also stated that a contract should whenever possible be construed so that the intention of the parties may be carried out rather than frustrated. And, lest it be forgotten, this intention is derived from the consensus of both parties, not just the defendants. *Yong Tong Hong*, as such is not apt authority in its application to the facts in this case. In that case there was clearly a written agreement expressing both parties' intention that the tenant was to acquire a permanent tenancy and that the RM8000 deposit was a consideration for such an arrangement. In contrast, exh D1 spoke only of a monthly tenancy, and nothing else, and is accepted by this court as evidence contradicting the defence contention. B C

Mr Chee further urged this court to scrutinize exh D1 and view the circumstances surrounding the entering into that tenancy agreement. He contended that exh D1 is no ordinary monthly tenancy agreement and adverted to the fact that exh D1 did not contain a termination clause, nor any clause allowing the landlord to increase the rent. These unique characteristics, he said, would support the irresistable inference that LWY must have given HH an assuarance that the latter may occupy the said premises for as long as they wished. He further submitted that HH had already expended a huge sum of RM225,000 to decorate and furnish an empty building in order to turn it into a functional hotel, and a further RM191,000 in 1992 to upgrade and refurbish the hotel. All these factors he added must bring to a conclusion that the tenancy was clothed with an equity to occupy for as long as HH wished. I regret, this court is unable to accede to that submission and find it to be without any basis. I could find nothing peculiar with exh D1 even accepting the fact that it is silent on the mode of the tenancy's termination and on the right of the landlord to increase rental. DW3 had testified that he was present together with Mr Yong Kin Chin when their lawyer discussed with them the contents of exh D1. The lawyer had spoken to them in Chinese and they were happy with the terms contained therein. DW3 had even stated that 'Mr Yong happily signed exh D1'. He also stated that the lawyer informed them that, under exh D1, HH may occupy the said premises for as long as they wished. When referred to exh D1, DW3 however admitted that such a term was not found in it. When asked why their lawyer had not followed the instructions given by Mr Yong, DW3 could merely answer that they trusted their lawyer to follow the terms and conditions as had been verbally instructed. My assessment of DW3's evidence was done with circumspection. He was wishy-washy in trying to import into exh D1, a term which did not exist, never envisaged and in my considered view, purely imaginary. I could not accept his testimony that HH's lawyer had missed this all-important and significant term in exh D1 or could have interpreted exh D1 as creating a tenancy for as long as HH wished. D E F G H I

I had allowed the defence to adduce parole evidence to contradict the written tenancy agreement, in spite of the plaintiff's objection that it ran foul

of ss 91 and 92 of the Evidence Act 1950, in view of the defence that there was a representation or promise made by LWY to the defendants and that the court, when viewing the total circumstances may find that an oral collateral agreement had been made between the parties (see *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16). Alas, after discerning the oral evidence adduced by the defence and viewed against the overall antecedents and events surrounding the execution of D1, I find that the defendants had also failed to prove the existence of any such collateral agreement.

As regards the extra expenditure expended by HH, I find that to be as nothing more than the normal expenditure expected of any hotel business in maintaining and upgrading their services and the upkeep and refurbishing of a hotel operation. It is also my view that such expenditure must be towards the improvement on the land itself, if the defendants were to derive a benefit in equity by reason of it (see *Alfred Templeton's* case). It must also be shown that such expenditure was the result of the landlord's conduct leading HH to expect that it may occupy for as long as they wished. (see *Cheng Hang Guan*). In other words, HH must show that they acted to their detriment in reliance of a belief that they would acquire that interest. HH failed to do so. In any event, other than DW3's and DW5's bare assertions that that sum of money was expended, no evidence was forthcoming to support it. DW3 stated that that expenditure was reflected in HH's accounts but had failed to produce the accounts. Similarly, DW5's assertion was also not supported by any documents. The view expressed by the learned Judge in *Lee Lean Low v Chew In Hai & Ors* [1993] 2 AMR 3244 at p 3249, may now be quoted as also applicable to the present situation:

> In the present appeal, there was no evidence, other than the allegation by the appellant, that the character of the said house had changed. There was no attempt made by the appellant to show proof that he had effected a change to the character of the said house by tendering photographs, calling witness and to produce receipts of repairs and renovations to the said house. The appellant was represented by counsel before the trial court and surely these supportive evidence could easily be arranged.

As regards exh D2, defence counsels had submitted that it would be unreasonable for one to pay a huge brokerage fee of RM34,000 over forty years ago, merely to secure a monthly tenancy. I am of the view that that agreement with the brokers had nothing to do with LWY, the then owners of the said premises. No evidence was led that the two brokers were agents of LWY and had represented to the defendants that they would be tenants for as long as they wished. In fact DW4 in evidence admitted that the brokers did not undertake to secure such a tenancy. Likewise, DW3 admitted that the payment was an absolute gift to the brokers. There was also no evidence that the brokers acted under the 'holding out' doctrine. Exhibit D2 itself stated that HH would be a monthly tenant on the said premises and the car park area (see cl 3 therein). If the parting with such a huge sum then was for a purpose other than merely to secure a monthly tenancy from the brokers, as was so arduously argued by learned defence counsels, why did it not cross the minds of the parties then to include that

simple yet crucial term into exh D2?. It may be recalled that exh D2 was prepared by HH's solicitor pursuant to instructions given by the partners. In the circumstances, I can only conclude that that expenditure was nothing more than a brokerage fee with no conditions attached or representations made.

(ii) If the alleged equity existed, whether it has been satisfied

The defence had asked for a tenancy of 99 years under s 221 NLC, from 21 July 1958 the date when the tenancy was created. The extent of the equity sought by the defendants is the maximum period permissible by law. It was submitted that since the tenancy of HH was in respect of the whole of the said premises, this court may therefore grant the maximum period under the NLC. Assuming it existed, it would have been borne under the tenancy agreement, executed on 21 July 1958. The defendants themselves asked for it to run from that date. The applicable law then was the Land Code (Cap 138) and in particular under s 47 which is the precursor of s 221 NLC. For easy reference, s 47 Land Code (Cap 138) is reproduced:

> In the absence of any restriction in that behalf of his interest set forth in his document of title or imposed by law a proprietor shall have the right to transfer or charge or lease his land to any such individual person, company or body corporate as is in Section 10 mentioned, but so that no lease executed after the coming into force of this Enactment shall be for a longer period than thirty years.

The maximum period of a lease under s 47 was 30 years, as compared to 99 years under s 221 of the NLC. The NLC came into effect on 28 January 1966, long after the execution of exh D1. When that tenancy agreement was entered into, it must have been envisaged by the parties — assuming that HH was given a tenancy for as long as they wished — that the long term tenancy were governed by the existing law then, ie s 47 of the Land Code. This section survived the NLC and was saved thereunder by s 4(1) thereof, which states:

> Savings
>
> (1) Nothing in this Act shall affect the past operation of, or anything done under, any previous land law or, so far as they relate to land, the provisions of any other law passed before the commencement of this Act:
>
> Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this Act by virtue of any such law shall, except as hereinafter expressly provided, be subject to the provisions of this Act:

I am also of the considered opinion that the assumed tenancy-in-equity of HH does not fall within the categories 'right' or 'privilege' mentioned in the proviso of the abovestated section, to fall under s 221(3) of the NLC. Put differently, the maximum 30 years tenancy could not, with the coming into force of NLC, be read as automatically extended to 99 years under s 221(3) NLC. In my view, the category 'right' as mentioned in the proviso of s 4(1) is confined only to such rights for which no time limitation are attached. It would therefore be applicable to rights such as easements or rights of way

under Part VI, or rights reserved to the State under Part III of the Land Code (Cap 138). Such rights survived and are now read as those rights under the current NLC, by virtue of the said proviso. To interpret the proviso as extending to a tenancy limited under the then Land Code (Cap 138) such as a 30-year lease under s 47, would result in a ludicrous situation. For instance in this case, if HH were indeed entitled to an equity to remain in occupation for as long as they wished, it would mean that they could now claim (as they now do) to be automatically in occupation for the allowable maximum of 99 years, meaning that their tenancy would extend to the year 2057. What if, before that period expires, the NLC were to be amended and the maximum lease period were again extended to, say, 150 years. Could HH then claim that they could still be in occupation for the further extended period? Surely this was not what was intended by the parties when the tenancy agreement was executed in 1958. And surely too, it assuming that the RM25,000 expended by HH then was for the purpose of improvement of the said premises, the parties had not forseen or intended that HH could stay for that long. The defendants in the instant case are asking for an equitable remedy, and so must themselves be prepared to see justice done. The maxims of equity such as 'He who seeks equity must do equity' and 'Equity delights in equality' must, in this instant case, be applicable to them too. This court would be doing a great injustice to the plaintiff to allow the defendants a 99-year tenancy based on the contention that the latter had expended RM25,000 in 1958. It is therefore, my finding that, by virtue of s 47 Land Code (Cap 138), their equity, assuming it existed, had long been exhausted.

I am also of the view that the equity, assuming it existed, had been fully satisfied. The defendants had been in occupation of said premises for over 40 years now. They had operated HH, seemingly successfully as an on-going business. There was evidence that the partners had individually reaped profits of RM10,000 per month over the years. Even assuming that the RM25,000 was expenditure towards improving the said premises, I find that there had been sufficient satisfaction of the equity in view of HH's long occupation. As Denning LJsaid in *Inward v Baker*, that (at p 449):

> It is for the court to say in what way the equity can be satisfied.

(See also *Cheng Hang Guan* and *Saadian bte Karim v Ong Ting Chai*). Their continued occupation after the 30 years limit must at best, be deemed to be on a monthly basis. It is also my finding that when the plaintiff bought the said premises he had done all that he reasonably could, either from personal queries or through his solicitors, to determine that there was no special tenancy other than a monthly one attached to HH. I also accept PW5's testimony that her company (LWY) had never intended to grant HH a tenancy for as long as they wished. I also accept her explanation and that of PW7's (solicitor from the legal firm which prepared exh P1), that the phrase 'subject to the rights of the occupants' inserted into that sale and purchase agreement was a common clause put into agreements involving rent-controlled premises, in order to protect the statutory tenants. This court also find that there was sufficient evidence, even during negotiations for the

purchase of the said premises, that the parties and their solicitors were under the impression that the shophouses (including the HH premises) belonging to LWY along Jalan CM Yussuf were then rent-controlled premises since there were no subsisting tenancy agreements with the existing tenants. That phrase was therefore included into exh P1 merely to protect the vendor, LWY, and that the plaintiff as purchaser would take over any statutory obligations to the tenants. It could not be interpreted, as submitted by the defence, that the defendants had a right to something more than a monthly tenancy.

The notice to quit

For the reasons discussed above I find that the notice to quit was valid and effective. The plaintiff as the new landlord was not deprived of a right to increase the rent, even though such right was not mentioned in exh D1. As a monthly tenant, HH was entitled to receive, which they did, a month's notice. There was no dispute that the notice was received by the defendants. The notice (exh P8) was dated 22 April 1993 and had given the defendants a dateline of 31 May 1993, to hand over vacant possession. Since HH remained in occupation, impliedly on a monthly tenancy basis, the time period stated in the notice, I find, is sufficient and valid to effect its termination. In *Saadian bte Karim v Ong Ting Chai* it was said (at p 660–661):

> The length of notice depends on the period of the tenancy. In the case of periodic tenancies of less than a year, the notice to quit must be one full period, expiring at the end of a completed period. Therefore, a weekly tenancy requires a week's notice and a monthly tenancy requires a month's notice. If insufficient notice had been given, it would be in effective to terminate the tenancy (see *Mohamed Din v Sockalingam Chettiar* [1946] MLJ 134; *Yeoh Pang Kwan v William Janz* [1972] 1 MLJ 25). In *Abdul Murthalib bin Hassan v Maimoon bte Haji Abd Wahid* [1992] 2 MLJ 108, Lamin J (as he then was) said that where the notice to quit is invalid the tenant continues to have exclusive possession of the premises. In *Ko Teck Kin v Watkinson* [1961] MLJ 73 where a monthly tenancy commenced from 1 April 1959, a notice to quit dated 20 August 1959 to expire on 15 September 1959 was held invalid as a full period's notice was not given. Buttrose J said in that case:
>
> > 'Putting the question in another way, can the defendant determine his monthly tenancy in the middle of a current month of the tenancy or must it be at the end of it?
> >
> > It is well established that in a monthly tenancy the period of the notice to quit, in the absence of special agreement, must correspond with the length of the tenancy and must determine at the end of a periodic month from the commencement of the tenancy. If authority is required see *Queen's Club Garden Estates Limited v Bignell* 39 TLR 496, *Precious v Reedie* [1924] 2 KB 149 and *Lemon v Lardeur* [1946] KB 613. ...'

There is therefore no basis for that notice to be impugned.

Damages:

Evidence was led through PW8, a garment manufacturer, who said that he had met the plaintiff some time in March 1993 and offered to rent the said

premises at RM25,000 per month. Other than that an oral discussion was held between PW8 and the plaintiff, I find that there was no other evidence worthy of serious consideration that that offer was a firm or, even a genuine one. PW4 was the appraiser who prepared the valuation report (exh P25) on the said premises in November 1993. He also came to an opinion that the fair rental of the said premises was RM25,000 per month. After scrutinizing exh P25 I also rejected it as one unsafe for this court to rely upon since the comparables used in coming to an opinion on the rental value of HH were commercial shoplots of smaller sizes.

I however agree with the submission of learned counsel for the plaintiff that double-rental may be claimed against HH under s 28(4)(a) Civil Law Act 1956, which states:

> Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

Once the notice to quit expires, the defendants were holding over and the plaintiff is entitled to double rental (see *Imbi World Sdn Bhd v Deluxe Tours Sdn Bhd* [1997] 3 MLJ 531.

There was evidence to show that HH had agreed in June 1993, to pay a rental of RM13,000 per month to the plaintiff (see exh P10). I had used that as a basis to determine the value of the rent and had thus allowed the plaintiff double rental at RM26,000 per month beginning 1 June 1993, to date, with interests. From this sum a deduction shall be made from all interim rentals paid by HH, to date, and pursuant to the order made by the High Court on 31 May 1995 ordering the defendants to continue paying a rental of RM5,100 per month from 1 April 1993 until disposal of this suit.

Judgment as prayed by the plaintiff is so ordered. Costs of this suit and the interlocutory applications since made, unless otherwise ordered, shall be borne by the defendants. The defendants counterclaim is also dismissed with costs.

Order accordingly.

Reported by Joel Ng